Supreme Court, U.S.
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No. 15-797

IN THE

Supreme Court of the United States

BOBBY JAMES MOORE,
Petitioner,

vs.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether Texas's standard for determining if a capital defendant is intellectually disabled violates the Eight Amendment and this Court's decisions in *Hall v. Florida*, 134 S. Ct. 1986 (2014) and *Atkins v. Virginia*, 536 U.S. 304 (2002) by not strictly applying the most current medical definition of intellectual disability;

2. Whether the execution of a condemned individual, who has successfully availed himself of the appellate process for over thirty years, violates the Eighth Amendment's prohibition against cruel and unusual punishment due to the length of his incarceration on death row.

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REASONS TO DENY THE PETITION

Petitioner Bobby James Moore was convicted and sentenced to death in 1980 for the capital murder of seventy-year-old James McCarble. Following a grant of federal habeas relief, Moore was given a new punishment hearing in February 2001 where he again received a sentence of death. Moore unsuccessfully challenged his sentence on direct appeal and on state collateral review. He now seeks certiorari review of the Texas Court of Criminal Appeals' (TCCA) denial of habeas relief. Specifically, because he disagrees with the court's findings that he is not intellectually disabled and thus ineligible for the death penalty, Moore asks this Court to declare Texas's entire framework for evaluating intellectual disability claims in capital cases unconstitutional. He also urges this Court to find that the length of time he has been incarcerated on death row somehow renders his sentence unconstitutional. Neither is a compelling reason for this Court to review his case. *See* Sup. Ct. R. 10.

1. Moore has yet to seek federal habeas relief, choosing instead to seek certiorari immediately following the denial of state habeas relief. But given the fact-intensive nature of Moore's intellectual disability allegation, along with the sheer length of the state court record, the more appropriate avenue for consideration of his federal constitutional claims would be federal habeas proceedings. Moore's attempt to circumvent the strict standards imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) during federal habeas review should not be rewarded.

2. Moore's assertion that the state courts must rely on current medical standards when evaluating claims of intellectual disability under *Atkins* is misleading. In *Atkins*, this Court specifically left to the individual states the task of developing appropriate ways to enforce the constitutional restriction against executing intellectually disabled offenders. Nothing in either *Atkins* or *Hall* requires states to employ clinical definitions of intellectual disability, much less obliges them to employ the same underlying analysis that professional organizations currently use to determine which patients meet their definition of intellectual disability. Even so, the standard used by the TCCA to evaluate such allegations is, contrary to Moore's belief, remarkably similar to the current definition espoused by the medical community, and is consistent with this Court's opinions in both *Atkins* and *Hall*.

3. Finally, Moore provides little support for the proposition that a death row inmate can diligently exercise his right to challenge his conviction both directly and collaterally, and then argue that the resultant delay renders his sentence cruel and unusual. Because any such delay is largely of the defendant's own making, no court—state or federal—has held that a lengthy stay on death row renders his sentence unconstitutional under the Eighth Amendment.

For these reasons, this Court should deny the instant petition for writ of certiorari.

STATEMENT OF THE CASE

I. THE FACTS OF MOORE'S CAPITAL MURDER.

The TCCA adequately summarized the facts of the offense in its unpublished opinion on direct appeal:

> The record reflects that on April 25, 1980, [Moore] and two accomplices, Anthony Pradia and Willie Koonce, drove around looking for a place to commit a robbery. They came upon the Birdsall Super Market and Pradia went inside the store to "check it out." After Pradia reported seeing an elderly man and woman in the courtesy booth, and a pregnant woman at the registers, they decided that the store would be a good choice and subsequently discussed their respective roles in the robbery. [Moore] carried a shotgun, while Pradia carried a pistol. The three men entered the store.
>
> [Moore] and Koonce walked up to the courtesy booth. Koonce entered the booth and told James McCarble and Edna Scott, who were working inside the booth, that they were being robbed and demanded money. According to several witnesses, [Moore] lifted his shotgun to his shoulder and pointed it at McCarble and Scott through the courtesy booth window. When Scott yelled out, [Moore] pointed the gun at McCarble, looked down the barrel while raised on his toes, and shot McCarble in the

> head. Arthur Moreno, who was working as a stocker in the store at the time of the robbery, testified that when [Moore] shot McCarble, McCarble's hands were in the air and McCarble made no sudden moves before he was shot.

Moore v. State, No. 74,059, slip op. at 2 (Tex. Crim. App. Jan. 14, 2004) (unpublished).

II. RELEVANT PROCEDURAL HISTORY.

Moore was indicted, convicted, and sentenced to death in July 1980 for the robbery and murder of James McCarble. X SHCR 3809 (Judgment); X SHCR 3810 (Sentence).[1] His conviction and sentence were affirmed on direct appeal by the TCCA. *Moore v. State*, 700 S.W.2d 193 (Tex. Crim. App. October 9, 1985), *cert. denied*, 474 U.S. 1113 (1986). Following state and federal habeas proceedings, a federal district court found that Moore was denied the right to the effective assistance of counsel during the punishment phase and granted federal habeas relief. The Fifth Circuit affirmed the grant of habeas relief and ordered that Moore either be given a new punishment hearing or a sentence less than death. *Moore v. Johnson*, 194 F.3d 586 (5th Cir. 1999). Moore was given a new sentencing hearing in February 2001, where he again received a sentence of death. X SHCR 3812 (Sentence). The TCCA affirmed this sentence on direct appeal. *Moore v. State*, No.

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[1] "SHCR" refers to the state habeas Clerk's Record—the transcript of pleadings and documents filed with the court during Moore's state habeas proceeding—and is preceded by volume number and followed by the relevant page numbers.

74,059, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (unpublished).

While his direct appeal was still pending, Moore filed a state application for writ of habeas corpus in the trial court challenging his 2001 punishment retrial and sentence. I SHCR 2-422. Moore's application raised a total of forty-eight claims for relief, including his allegations that the Eighth Amendment barred his execution due to (1) his intellectual disability under *Atkins*, and (2) the length of time he has already spent on death row. *Id.* at 48-61, 202-215. In January 2014, the trial court held a two-day evidentiary hearing on Moore's *Atkins* claim and heard argument on the evidence.

Following the evidentiary hearing, the trial court entered 184 findings of fact and conclusions of law recommending that habeas relief be granted on Moore's *Atkins* allegation. *See* Pet. 127a-203a; X SHCR 3558-3627 Specifically, after considering the numerous pleadings and exhibits presented by both parties, as well as the trial court record and the testimony of the witnesses presented at the evidentiary hearing, the trial court concluded that Moore had met the definition of intellectual disability as defined by the current guidelines of the American Association on Intellectual and Developmental Disabilities (AAIDD) and the American Psychiatric Association (APA). Pet. 202a. The court also entered findings and conclusions recommending that relief be denied on all of the remaining non-*Atkins* grounds, including his allegation concerning his prolonged confinement on death row. Pet. 279a-281a.

Thereafter, the entire record was transmitted to the TCCA and the case was set for the court to address the *Atkins* claim.[2] *See* Tex. Code. Crim. Proc. Ann. art. 11.071, §§ 9(f)(1), 11. Finding that the trial court erred in employing the clinical definition of intellectual disability presently used by the AAIDD and APA rather than the legal definition adopted by the court in *Ex parte Briseño*, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004), the TCCA rejected the trial court's findings and conclusions concerning *Atkins*.[3] Pet. 5a-7a; *Ex parte Moore*, 470 S.W.3d 481,486 (Tex. Crim. App. Sept. 16, 2015). Although it "may be true that the AAIDD's and APA's positions regarding the diagnosis of intellectual disability have changed since *Atkins* and *Briseño* were decided," the court stated, the medical community does not ultimately make the determination of whether an individual "is exempt from execution under *Atkins*." Pet. 6a-7a. Rather, that decision rests with the TCCA itself, which continues to follow the definition adopted in *Briseño*, as that definition remains "adequately informed by the medical community's diagnostic framework." Pet. 7a (citing *Hall*, 134 S. Ct. at 2000).

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[2] In Texas, the trial court is the "original factfinder" in habeas corpus proceedings and the TCCA is the "ultimate factfinder." *Ex parte Van Alstyne*, 239 S.W.3d 815, 817 (Tex. Crim. App. 2007) (per curiam). As a matter of course, the TCCA pays great deference to the trial court's recommended findings of fact and conclusions of law, as long as they are supported by the record. *Id.*

[3] The TCCA affirmed the trial court's denial of the remainder of Moore's allegations, including his Eighth Amendment challenge regarding the amount of time he has been incarcerated on death row. Pet. 92a-93a.

For this reason, the TCCA did not adopt the findings and conclusions of the trial court, and instead assumed its role as the ultimate factfinder. Pet. 12a. After an independent review of the entire record, the court concluded that the record failed to support the trial court's findings or conclusions concerning Moore's *Atkins* allegation. *Id.* As the court explained, the trial court "appears to have either not considered, or unreasonably disregarded, a vast array of evidence in [the] lengthy record that cannot rationally be squared with a finding of intellectual-disability." *Id.* As such, the court denied Moore habeas relief. Moore now seeks certiorari review of this decision.

ARGUMENT

I. THE QUESTIONS MOORE PRESENTS FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION AND ARE MORE APPROPRIATE FOR FEDERAL HABEAS REVIEW.

Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." Where a petitioner asserts only factual errors or that a properly stated rule of law was misapplied, certiorari review is "rarely granted." *Id*; *Ross v. Moffitt*, 417 U.S. 600, 616–17 (1974) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review.").

As shown below, no compelling reason exists to review this case. Even if the Court were inclined to grant review, it need not do so in the instant proceeding

because Moore has yet to seek federal habeas corpus relief. As Justice Stevens explained:

> This Court rarely grants review at this stage of the litigation even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims. Instead, the Court usually deems federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims.

Kyles v. Whitley, 498 U.S. 931, 932 (1990) (Stevens, J., concurring in denial of a stay).

In his petition, Moore suggests that the Court should consider his claims now because it will more difficult for him to overcome the "high hurdles" imposed during federal habeas review as a result of AEDPA. Pet. 34. But this argument is misguided. The AEDPA standards are "'difficult to meet[]' because the purpose of AEDPA is to ensure that federal habeas relief functions as a 'guard against extreme malfunctions in the state criminal justice systems,' and not as a means of error correction." *Greene v. Fisher*, 132 S. Ct. 38, 43 (2011) (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011)). AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to [. . .] to ensure that state-court convictions are given effect to the extent possible under the law." *Bell v. Cone*, 535 U.S. 685, 693 (2002). Granting Moore's request would frustrate this clear purpose.

Further, consideration of Moore's state collateral review proceedings by this Court is particularly inapt at

this juncture given the length of his trial, appeal, and state habeas proceedings, particularly the multitude of witnesses (including the nine who testified at the evidentiary hearing) whose testimony concerns Moore's *Atkins/Hall* allegation.[4] Although both the TCCA and Moore admirably attempted to summarize the evidence presented in these proceedings, it is likely that many of the relevant facts underlying the decision of the state habeas court and the TCCA were omitted. Where the state habeas proceeding generated facts too plentiful to be given full review in the limited context of a petition for writ of certiorari, it is undoubtedly more appropriate that litigation of this type of claim first occur in federal district court.

This Court should therefore decline to permit Moore to circumvent AEDPA by granting his petition at this premature juncture—especially since his petition presents no important questions of law to justify the exercise of certiorari jurisdiction in the first place.

II. THE STATE COURT'S REJECTION OF MOORE'S *ATKINS* CLAIM IS NOT IN CONFLICT WITH THE EIGHTH AMENDMENT OR THIS COURT'S PRECEDENT.

Moore's position is simple: he contends that under this Court's decisions in *Atkins* and later in *Hall*, the Eighth Amendment bars the execution of a prisoner who is deemed to be intellectually disabled under the most current medical standards. Pet. 10, 12. By using

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[4] Indeed, the TCCA's recitation of these facts took up over half the court's lengthy opinion on the *Atkins/Hall* allegation alone. *See Ex parte Moore*, 470 S.W.3d at 490-513.

an "outdated" definition of intellectual disability in rejecting his *Atkins* claim, Moore asserts that the TCCA eschewed this Court's requirement that current medical standards be consulted when making an intellectual-disability inquiry, and has thus abdicated its obligation to enforce the Eighth Amendment in general. *Id.* at 10-12. He urges the Court to grant review so that *Atkins* and *Hall* "do not become dead letters" in Texas. *Id.* at 11.

Moore's claim fails for two reasons. First, this Court has never held that states must employ clinical definitions of intellectual disability, let alone that they must employ the same underlying analysis that professional organizations (like the AAIDD or the APA) use to determine which patients meet each prong of those organizations' definitions. To do so would take the legal decision of whether a defendant is intellectually disabled out of the hands of the factfinder and place it in the hands of medical professionals—a result that was not required by this Court in either *Atkins* or *Hall*. *Hall*, 134 S. Ct. at 2000.

Second, the "outdated" standard that the TCCA uses to evaluate allegations of intellectual disability is, contrary to Moore's belief, entirely consistent with this Court's opinions in *Atkins* and *Hall*. Texas's legal definition of intellectual disability was derived from a medical definition that the AAIDD had previously advocated, and it remains consistent with the current definition of intellectual disability used by the medical community and the AAIDD. *See Hall*, 134 S. Ct. at 1994 (citing *Atkins*, 536 U.S. at 308 n.3); AAIDD Manual at 5. For these reasons, this Court's review is unwarranted.

A. *Atkins* did not require the adoption of any particular methodology for assessing claims of intellectual disability.

In *Atkins*, the Court held that the Eighth Amendment prohibits the execution of intellectually disabled offenders, 536 U.S. at 321, but it stopped short of clearly establishing which offenders would qualify. Instead, the Court recognized that there was "serious disagreement" when it came to "determining which offenders are in fact [intellectually disabled]." *Id.* at 317 ("Not all people who claim to be [intellectually disabled] will be so impaired as to fall within the range of [intellectually disabled] offenders about whom there is a national consensus.").

In providing guidance regarding the definition of intellectual disability, the Court cited with approval the American Association on Mental Retardation (AAMR)[5] and APA definitions of intellectual disability, which require (1) significantly subaverage general intellectual functioning, (2) concurrent significant limitations in adaptive functioning, and (3) onset before age eighteen. *Id.* at 309 n.3. Rather than formulating a rule for what subset of those who claimed to be intellectually disabled would be ineligible for the death penalty, however, the

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[5] The AAMR is a professional non-profit association that advocates for the rights of the mentally impaired and those with developmental disabilities. *Ex parte Cathey*, 451 S.W.3d 1, 15 n.40 (Tex. Crim. App. 2014). In 2007, it changed its name to the American Association on Intellectual and Developmental Disabilities (AAIDD), reflecting the change in terminology from "mental retardation" to "intellectual disability." *Hall*, 134 S. Ct. at 1990, 2003 n.1.

Court expressly "le[ft] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction." *Id.* at 317. This is consistent with the Court's prior precedent that it has "traditionally left to legislators the task of defining terms of a medical nature that have legal significance." *Kansas v. Hendricks*, 521 U.S. 346, 359 (1997) (concerning when someone may be civilly committed due to mental illness).[6]

Underlying his petition is Moore's belief that the legal definition of intellectual disability for Eighth Amendment purposes should match the clinical definition. To the contrary, this Court's precedent explicitly recognizes that legal and clinical standards are not always the same. *See, e.g., Hendricks*, 521 U.S. at 359 (noting that legal definitions of "insanity" and "competency" "vary substantially from their psychiatric counterparts"). "Legal definitions . . . which must 'take into account such issues as individual responsibility . . . and competency,' need not mirror those advanced by the medical profession." *Id.* (quoting American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders xxii, xxvii (4th ed. 1994)).

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[6] Notably, the Court has rejected the notion that *Atkins* only delegated to the states procedural matters regarding intellectual disability. *Bobby v. Bies*, 556 U.S. 825, 831 (2009) (stating that *Atkins* "did not provide definitive procedural or substantive guides for determining whether a person who claims [intellectual disability], 'will be so impaired as to fall [within *Atkins*'s compass].") (citation omitted).

While the *Atkins* Court cited with approval the AAMR and APA definitions, it did not hold that states must follow those clinical definitions or associated clinical protocol. *Atkins*, 536 U. S. at 309 n. 3, 317 n. 22; *see also Clark v. Quarterman*, 457 F.3d 441, 445 (5th Cir. 2006) (dismissing the notion that *Atkins* created any criteria for a state's definition of intellectual disability). As the Fifth Circuit explained:

> *Atkins* clearly did not hold. . . that states must employ the AAMR or APA definitions of [intellectual disability], let alone that they must employ the same underlying clinical analysis that the AAMR or APA use to determine which patients meet each prong of those organizations' definitions; the absence of such a holding is determinative here.

Chester v. Thaler, 666 F.3d 340, 347-48 (5th Cir. 2011), *cert. denied*, 133 S. Ct. 525 (2012) (Mem.). Rather, the Court's references to the AAMR and APA definitions was merely a description of a subset of all definitions—specifically those in use by clinicians and service providers—which stops short of requiring statutory, criminal justice definitions to follow the same pattern. Otherwise, Moore would have to explain why the Court failed to adopt such clinical standards when it had the opportunity to do so, or why the Court has since held that it did not provide a substantive definition. *See Bobby*, 556 U.S. at 831.

Citing *Hall*, Moore argues that because "clinical definitions of intellectual disability . . . were a

fundamental premise of *Atkins*," individual states may not "go against unanimous professional consensus" nor "disregard established medical practice" in making its legal determination. Pet. 13 (quoting *Hall*, 134 S. Ct. at 1995, 2000). But his reliance on *Hall* is again misplaced. Although the Court noted that the states do not have "complete autonomy to define intellectual disability as they wish" and read *Atkins* "to provide substantial guidance on the definition of intellectual disability," the Court nonetheless determined that "[t]he legal determination of intellectual disability is distinct from a medical diagnosis." *Hall*, 134 S. Ct. at 1999-2000. As the Court recognized, "the science of psychiatry . . . informs but does not control ultimate legal determinations." *Id.* (citing *Kansas v. Crane*, 534 U.S. 407, 413 (2002)).

Furthermore, *Hall* "exclusively addresses the constitutionality of mandatory, strict IQ test cutoffs[,] and "Texas has never adopted the bright-line cutoff at issue in *Hall*." *See Mays v. Stephens*, 757 F.3d 211, 218 (5th Cir. 2014) (citing *Hearn v. Thaler*, 669 F.3d 265, 268-69 (5th Cir. 2012)), *cert. denied*, 135 S. Ct. 951 (2015) (Mem.). As such, *Hall* provides no support for Moore's insistence that the legal determination of intellectual disability must strictly adhere to most recent clinical definition.

B. The test employed by the TCCA for assessing claims of intellectual disability is consistent with this Court's precedent.

In response to *Atkins*, the TCCA established guidelines for determining whether a defendant has "that level and degree of [intellectual disability] at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty." *Ex parte Briseño*, 135 S.W.3d at 6. The court adopted the definition of intellectual disability then in use by the AAMR and the similar definition of intellectual disability contained in the Texas Health and Safety Code. *See Briseño*, 135 S.W.3d at 5-8; Tex. Health & Safety Code §§ 591.003(7-a), (13). Under this definition, a defendant must prove by a preponderance of the evidence the following three-prongs: (1) significantly subaverage general intellectual functioning, generally shown by an IQ of about 70 or below[7] (approximately 2 standard deviations below the mean), (2) accompanied by related limitations in adaptive functioning, (3) the onset of which occurs prior to the age of eighteen. *Briseño*, 135 S.W.3d at 6-7, n.24.

As discussed previously, *Atkins* did not require that evidence of adaptive functioning be assessed under a particular medical diagnostic framework like Moore now suggests. Nevertheless, recognizing that the

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[7] Texas courts recognize that mental health professionals are flexible in their assessment of intellectual disability; thus, sometimes a person whose IQ has tested above 70 may be diagnosed as intellectually disabled while a person whose IQ tests below 70 may not be disabled. *See Cathey*, 451 S.W.3d at 10; *Briseño*, 135 S.W.3dat 7 n.24.

adaptive criteria are "exceedingly subjective," the TCCA provided seven additional "evidentiary factors" that factfinders might also use in determining whether an individual is intellectually disabled. *Id.* at 8-9.[8] Each of these factors are consistent with this Court's opinion in *Atkins* and are adequately "informed by the medical community's diagnostic framework." *See Hall*, 134 S. Ct. at 2000.

The first factor—whether those who knew the defendant at a young age believed he was intellectually disabled and acted accordingly—actually reflects the AAIDD definition, which requires the presence of adaptive deficits before age eighteen. *Atkins*, 536 U.S. at 308 n.3; *Briseño*, 135 S.W.3d at 7-8. And the next three factors—impulsiveness, leadership, and rational responses to external stimuli—all come from *Atkins*. *Briseño*, 135 S.W.3d at 8. The diminished capacity to control impulses is mentioned repeatedly by the Court as reducing the culpability of the intellectually disabled. *Atkins*, 536 U.S. at 306, 318, 320. The Court also stated that, in group settings, the intellectually disabled are

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[8] The TCCA did not make consideration of any or all of the *Briseño* factors mandatory. *Ex parte Cathey*, 451 S.W.3d at 11 n.22; *Ex parte Sosa*, 364 S.W.3d 889, 892 (Tex. Crim. App. 2012). The *Briseño* factors were designed to assist factfinders in making the "relatedness" determination—that is, whether a defendant's adaptive limitations are related to a deficit in intellectual functioning or some other cause. *Briseño*, 135 S.W.3d at 8. They also reflect the court's concern that the guidelines used by mental health professionals and advocacy groups should not be considered in isolation, but rather in the context of the concerns expressed by this Court in *Atkins*. *See Sosa*, 364 S.W.3d at 892; *Cathey*, 451 S.W.3d at 11 n.22.

typically followers, not leaders. *Id.* at 318. Whether an individual has rational responses to external stimuli can be seen in the Court's focus on an intellectually disabled person's capacity to understand the reactions of others, to engage in logical reasoning, and to process information, all of which are referenced throughout the Court's opinion. *Id.* at 306, 318, 320.

The fifth factor, communication, is especially relevant, as it is part of the AAIDD and APA definitions of adaptive functioning. *Atkins*, 536 U.S. at 308 n.3; *Briseño*, 135 S.W.3d at 8. The diminished capacity to communicate was relied on in *Atkins* to justify a categorical ban, as the Court noted that intellectually disabled defendants are "less able to give meaningful assistance to their counsel and are typically poor witnesses." *Id.* at 318, 320-21. The final two factors—the ability to lie and whether the capital offense required forethought and complex execution—reflect the Court's desire to draw a line between the "cold calculus" of premeditated murder and the more impulsive nature of the intellectually disabled. *Atkins*, 536 U.S. at 319; *Briseño*, 135 S.W.3d at 8-9.

Citing *Hall*, Moore maintains that courts must follow an established clinical protocol reflecting the most current medical standards when assessing evidence of adaptive functioning, presumably to the exclusion of the non-clinical factors (like those set forth in *Briseño*) that were considered under the "outdated" definition. Pet. 13-23. But arguments like Moore's have been repeatedly rejected by the circuit courts of appeal. *Chester*, 666 F.3d 340, 347-48 ("[O]n their face, nothing about [the *Briseño* factors] contradicts *Atkins*, as they were

developed explicitly to comply with *Atkins*."); *Hooks v. Workman*, 689 F.3d 1148, 1172 (10th Cir. 2012) (reasoning that "the clinical standard is not a constitutional command. The Supreme Court in *Atkins* could have adopted the clinical standard, but explicitly declined to do so."); *Larry v. Branker*, 552 F.3d 356, 369 (4th Cir.) (rejecting an allegation that *Atkins* "requires every state to employ a particular clinical approach to measuring a defendant's adaptive skills."), *cert. denied*, 130 S. Ct. 408 (2009). As the Fifth Circuit has explained:

> No reasonable jurist could theorize that the reasoning animating *Hall* could possibly be extended to *Briseño*. The cutoff at issue in *Hall* was problematic largely because it restricted the evidence—especially regarding adaptive functioning—that could be presented to establish intellectual disability. There is no similar restriction of evidence under *Briseño*. To the contrary, the *Briseño* factors merely provide further guidance to sentencing courts as to *what kinds* of evidence the court might consider when determining adaptive functioning.

Mays, 757 F.3d at 218; *see also Henderson v. Stephens*, 791 F.3d 567, 585-86 (5th Cir. 2015) (finding that *Hall* "does not call into question the constitutionality of the *Briseño* standard.").

Finally, Moore expresses concern that defendants with intellectual disability will be denied the protection of *Atkins* as a result of a court's consideration of non-clinical factors due to the fact that the "outdated"

medical standards are "very difficult (if not impossible) to apply in practice[.]" Pet. 16 (citing *United States v. Wilson*, 922 F. Supp. 2d 334, 340 (E.D. N.Y. 2013)). His concerns are unfounded. Despite his belief that clinicians would have to re-train themselves in the outdated *Briseño* factors every time they testify, Moore overlooks the fact that the *Briseño* factors are "evidentiary factors," not dispositive tests that require training. *Briseño*, 135 S.W.3d at 8. Moore has not identified any case in which a Texas court has determined a single *Briseño* factor to be dispositive.

Instead, multiple individuals in Texas have been determined to be intellectually disabled following the *Briseño* decision. *See, e.g.*, *Ex parte Van Alstyne*, 239 S.W.3d 815, 823-24 (Tex. Crim. App. 2007); *Ex parte DeBlanc*, No. AP-75113, 2005 WL 768441, at *1 (Tex. Crim. App. Mar. 16, 2005); *Ex parte Valdez*, 158 S.W.3d 438, 438 (Tex. Crim. App. 2004); *Ex parte Bell*, 152 S.W.3d 103, 104 (Tex. Crim. App. 2004); *Ex parte Modden*, 147 S.W.3d 293, 299 (Tex. Crim. App. 2004). Thus, the *Briseño* factors permit a finding of intellectual disability and do not "stack[] the deck against intellectually disabled prisoners." Pet. 16.[9]

Because he fails to demonstrate how Texas's standard for evaluating claims of intellectual disability

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[9] But given that the intellectually disabled comprise less than 3% of the population, it is not unusual that many offenders like Moore who claim intellectual disability are ultimately determined not to warrant that diagnosis. *Atkins*, 536 U.S. at 309 n.5.

contravenes *Atkins* or *Hall*, Moore's request for certiorari should be denied.

III. MOORE'S LENGTHY STAY ON DEATH ROW DOES NOT RENDER HIS SENTENCE UNCONSTITUTIONAL.

Moore next argues that carrying out his death sentence would constitute cruel and unusual punishment because he has been confined to death row since his incarceration in 1980. Pet. 26-34. Relying heavily on the numerous dissenting opinions written by Justice Breyer on the issue, Moore contends that his prolonged confinement on death row subjected him to excessively dehumanizing conditions such that the carrying out of his sentence would no longer serve the dual purposes of the death penalty—retribution and the deterrence of further capital crimes. *Id.* Despite the lack of any supporting case law, he invites the Court to determine "once and for all" whether there are limits to the amount of time a properly convicted defendant can spend on death row before his sentence becomes unconstitutional. The Court should decline the invitation for the same reasons it has repeatedly done so in the past.[10]

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[10] *See, e.g., Correll v. Florida*, __ S. Ct. __, 2015 WL 6111441 (2015) (denying certiorari on claim of a twenty-nine year delay); *Valle v. Florida*, 132 S. Ct. 1 (2011) (thirty-three year delay); *Johnson v. Bredesen*, 558 U.S. 1067 (2009) (twenty-nine years); *Thompson v. McNeil*, 129 S. Ct. 1299 (2009) (thirty-two years); *Smith v. Arizona*, 552 U.S. 985 (2007) (thirty years); *Knight v. Florida*, 528 U.S. 990 (1999) (nearly twenty years or more); *Elledge v. Florida*, 525 U.S. 944 (1998) (twenty-three years); *Lackey v. Texas*, 514 U.S. 1045 (1995) (seventeen years).

The question presented to the Court is not a new one. In *Lackey v. Texas*, the petitioner asked the Court to resolve whether his execution after a seventeen-year confinement on death row constituted cruel and unusual punishment under the Eighth Amendment. 514 U.S. 1045 (1995). Acknowledging the importance and novelty of the issue, Justice Stevens issued an invitation to state and lower courts to study the viability of such a claim before it was addressed by the Court. *Id.* (memorandum respecting denial of certiorari). In the twenty-one years since *Lackey*, these courts have resoundingly rejected such claims as meritless.

In the federal courts of appeal, several circuits have outright rejected the idea that a lengthy stay on death row violates a defendant's Eighth Amendment rights. *See, e.g.*, *Reed v. Quarterman*, 504 F.3d 465 (5th Cir. 2007) (rejecting a similar claim based on twenty-four years of death row incarceration); *ShisInday v. Quarterman*, 511 F.3d 514, 526 (5th Cir. 2007) (twenty-five-year stay on death row); *Carter v. Johnson*, 131 F.3d 452, 466 (5th Cir. 1997) (fourteen years); *Lackey v. Johnson*, 83 F.3d 116, 117 (5th Cir. 1996) (nineteen years); *Free v. Peters*, 50 F.3d 1362 (7th Cir. 1995) (twenty years); *Johns v. Bowersox*, 203 F.3d 538, 547 (8th Cir. 2000) (fifteen years); *Smith v. Mahoney*, 611 F.3d 978, 998 (9th Cir. 2010) (twenty-five years); *McKenzie v. Day*, 57 F.3d 1493, 1494 (9th Cir. 1995) (twenty years); *Richmond v. Lewis*, 948 F.2d 1473, 1492 (9th Cir. 1990) (sixteen years); *Stafford v. Ward*, 59 F.3d 1025, 1028 (10th Cir. 1995) (fifteen years).

Similarly, numerous state courts have also rejected the claim. *Smith v. State*, 74 S.W.3d 868, 869,

875-76 (Tex. Crim. App. 2002) (thirteen years); *Bell v. State*, 938 S.W.2d 35, 53 (Tex. Crim. App. 1996) (twenty years); *Moore v. State*, 771 N.E.2d 46, 54-55 (Ind. 2002) (twenty years); *People v. Sims*, 736 N.E.2d 1092, 1040-41 (Ill. 2000) (fifteen years); *State v. Moore*, 591 N.W.2d 86, 93-95 (Neb. 1999) (twenty years); *Hitchcock v. State*, 578 So.2d 685, 693 (Fla. 1990) (twelve years), rev'd on other grounds, 505 U.S. 1215 (1992); *People v. Fry*, 959 P.2d 183, 262 (Cal. 1998) (seven years); *Ex parte Bush*, 695 So.2d 138, 140 (Ala. 1997) (sixteen years); *State v. Schackart*, 947 P.2d 315, 336 (Ari. 1997).

Despite the fact that over two decades have passed since Justice Stevens' invitation to evaluate the claim, Moore has not presented this Court with a single court, state or federal, that has accepted the merits of his Eighth Amendment claim. Some courts have gone even further than simply dismissing the claim and have rejected it in the strongest of terms. *See, e.g., Felder v. Johnson*, 180 F.3d 206, 215 (5th Cir. 1999) (finding that defendant's claim that his twenty-year stay on death row constituted cruel and unusual punishment bordered on the "legally frivolous."); *Turner v. Jabe*, 58 F.3d 924, 933 (4th Cir. 1995) (Luttig, J., concurring) (describing a similar claim as a "mockery of our system of justice, and an affront to lawabiding citizens"). Such is the case for good reason—most of the delays are a result of the inmate's own making, having availed himself of the right to direct appeal and to seek collateral relief.

As the Fifth Circuit explained in *White v. Johnson*, 79 F.3d 432, 439-40 (5th Cir. 1996):

> [T]here are compelling justifications for the delay between conviction and the

> execution of a death sentence. The state's interest in deterrence and swift punishment must compete with its interest in insuring that those who are executed receive fair trials with constitutionally mandated safeguards. As a result, states allow prisoners such as White to challenge their convictions for years. White has benefitted from this careful and meticulous process and cannot now complain that the expensive and laborious process of habeas corpus appeals which exists to protect him has violated other of his rights. Throughout this process White has had the choice of seeking further review of his conviction and sentence or avoiding further delay of his execution by not petitioning for further review or by moving for expedited consideration of his habeas petition.
>
> Even if much of the delay in this case is the fault of Texas, White cannot now complain of cruel and unusual punishment. White made no effort to inform the Texas courts that their delay was detrimental to him or to ask for expedited review of his petition and we cannot fault them for assuming that White would be grateful for or, at least, indifferent to the delay. White cannot expect Texas courts to know that he wants to get on with his execution without telling them.

79 F.3d at 439.

In concurring with the Court's decision to deny a petition for certiorari on the same issue in *Knight v. Florida*, Justice Thomas further elaborated:

> I write only to point out that I am unaware of any support in the American constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed. Indeed, were there any such support in our own jurisprudence, it would be unnecessary for proponents of the claim to rely on the European Court of Human Rights, the Supreme Court of Zimbabwe, the Supreme Court of India, or the Privy Council.
>
> It is worth noting, in addition, that, in most cases raising this novel claim, the delay in carrying out the prisoner's execution stems from this Court's Byzantine death penalty jurisprudence . . . *See Coleman v. Balkcom*, 451 U.S. 949, 952 (1981) (Stevens, J., concurring in denial of certiorari) ("However critical one may be of . . . protracted post-trial procedures, it seems inevitable that there must be a significant period of incarceration on death row during the interval between sentencing and execution"). It is incongruous to arm capital defendants with an arsenal of "constitutional" claims

> with which they may delay their executions, and simultaneously to complain when executions are inevitably delayed. *See Turner v. Jabe*, 58 F.3d 924, 933 (4th Cir. 1995) (Luttig, J., concurring); Kozinski & Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L. Rev. 1, 25 (1995).

528 U.S. at 990.

In sum, Moore appears to seek a permanent bar to his execution because he has successfully taken advantage of the mechanisms that are in place to assure that his conviction and sentence comply with every constitutional standard. But it makes "a mockery of our system of justice . . . for a convicted murderer, who, through his own interminable efforts of delay . . . has secured the almost-indefinite postponement of his sentence, to then claim that the almost-indefinite postponement renders his sentence unconstitutional." *Turner*, 58 F.3d at 933 (Luttig, J., concurring). Ironically, the relief sought by Moore would also "further prolong collateral review by giving virtually every capital prisoner yet another ground on which to challenge and delay his execution." *Knight*, 528 U.S. at 990 (Thomas, J., concurring). Because he provides no support for such a frivolous allegation, Moore's allegation merits no further review from this Court.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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